No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; BILL SCHUETTE, ATTORNEY GENERAL, STATE OF MICHIGAN

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Executive Branch, by enacting the 14 November 2014 DADA Directive defer removal of aliens illegally in the United States, has unconstitutionally has unconstitutionally abdicated its duty to take care that the laws be faithfully executed and has unconstitutionally usurped authority that the Constitution delegates to the Legislative Branch.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law[1] (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the United States Constitution as interpreted strictly according to the intent of its Framers. Accordingly, the Foundation believes the separation of powers set forth in Article I, II and III of the Constitution should be strictly followed, because abdications of constitutional authority by one branch leave a vacuum in which other branches are likely to step, and usurpations by one branch of authority delegated by the Constitution to another branch, erode the strict limitations on power which the Framers imposed to prevent tyranny and protect liberty.

As a Christian organization, the Foundation believes this nation was founded upon and is strongly influenced by the Judeo-Christian tradition as set forth in the Holy Bible. The Foundation is concerned

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

that much misinformation about the nation's Judeo-Christian values is being spread to influence those in government in order to impose immigration policies that are not mandated by Scripture, not consistent with this nation's Judeo-Christian tradition, and not in the best interest of the American people. To counter such misunderstandings, the Foundation sets forth what it believes to be a correct understanding of the Judeo-Christian tradition and Biblical position on the subject of immigration.

SUMMARY OF ARGUMENT

As Chief Justice John Marshall wrote for this Court in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819), "We must never forget, that it is a *constitution* we are expounding." (emphasis original), *Amicus* urges this Court to apply the first principles of constitutional law in this case and to embrace the plain and original text of the Constitution, the supreme law of the land.

The President's duty in our constitutional system, according to Article II Section 3, is to "Take Care that the Laws be faithfully executed." Even if we allow some room for prosecutorial discretion, this does not include the power to effectively change national immigration policy by refusing to deport millions of aliens whom the law says it is the duty of the President to deport.

Not only has the President abdicated his executive duty to enforce the law; he has also usurped the congressional power to make law and policy. His executive memoranda are not authorized by the immigration laws enacted by Congress and currently in effect, nor were they adopted with opportunity for public "notice and comment" as the Administrative Procedure Act requires. By abdicating executive responsibility and usurping congressional power, the President has made a shambles of our constitutional system.

As a Christian organization dedicated to bringing a Biblical perspective to constitutional issues, *Amicus* Foundation for Moral Law has included a brief discussion of immigration as seen from a Biblical and Judeo-Christian perspective.

ARGUMENT

I. Introduction

Few if any current issues are as fraught with emotion, as well as with sincere religious and moral conviction, as immigration and naturalization. The American people, state and local governmental entities, and state and federal courts are confused and conflicted as to what they should do and what the Constitution allows or requires them to do.

It is therefore vitally important that this Court ensure that judicial pronouncements reflect the Constitution rather than emotion or ideological positions.

The Constitution itself and all federal laws pursuant thereto are the "Supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* The Constitution and the solemn oath thereto should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the

Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

This Court affirmed this approach in *South Carolina v. United States*, 199 U.S. 437, 448 (1905), declaring that "The Constitution is a written

instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." The Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S.570, 128 S. Ct. 2783, 2788 (2008):

"[W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or cleverest judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

Moreover, if the Constitution as written is not a fixed legal standard, then it is no constitution at all. By adhering to court-created tests rather than the legal text, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. James Madison observed in *Federalist No. 62* that,

It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who

knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). The constitutional text should be the basis for the judicial analysis in this and all other cases.

This Court should affirm the Fifth Circuit ruling to ensure that court rulings in this vital and controversial issue are decided according to the Constitution rather than according to emotion or individual ideological preferences.

II. The Executive Branch, by enacting executive directives that defer the removal of certain aliens unlawfully present in the United States, has unconstitutionally abdicated its duty under Article II, Section 3 to "Take Care that the Laws be faithfully executed."

Article II delegates certain powers to the President as head of the executive branch of government. Some of these powers involve a degree of discretion. For example, Sec. 2 says the President "may require" written opinions of officers of executive departments; he "shall have Power" to grant reprieves and pardons; he "shall have Power" to fill up vacancies. Sec. 3 says he "may" convene either or both Houses of Congress, and he "may" adjourn them.

Terms such as he "may" or he "shall have power" may imply a degree of discretion.

But no such discretionary language is found in the "Take Care" Clause. The language in this clause is mandatory: "He shall take Care that the Laws be faithfully executed."

The Take Care Clause requires the President to enforce all constitutionally valid acts of Congress, regardless of his own administration's view of their wisdom or policy. In other words, the Take Care Clause is a limit on the Vesting Clause's "executive power" of the President. David F. Forte and Matthew Spalding, *The Heritage Guide to the Constitution: Fully Revised Second Edition* 288 (2014).

The Take Care Clause prohibits the President from acting as a legislature, "simply disregarding or suspending laws enacted by congress", but requires the President to oversee the faithful execution of the laws. Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, U.S. Congressional Research Service (2014). "The president may neither breach federal law himself nor order his subordinates to do for defiance cannot be considered faithful execution." David F. Forte and Matthew Spalding, *The Heritage Guide to the Constitution: Fully Revised Second Edition* 288 (2014). When the delegates to the 1787 Philadelphia Convention drafted the constitution which focused on the presidential power, they wanted to put limits on the use of presidential power to put away any illusions that the holder of that office had the unchecked authority of a king. James Wilson, a very influential delegate from Pennsylvania, clearly

explained that President has the "authority, *not to make, or alter, or dispense with the laws*, but to execute and act the laws." Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, U.S. Congressional Research Service (2014).

The executive branch has also agreed on this view on the presidential power. "The Supreme Court and the attorney generals have long interpreted the Take Care Clause as standing for the proposition that the president has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes." Walter Dellinger, Memorandum for John Schmidt, Associate Attorney General, *Re: Constitutional Limitations on Federal Government Participation in Binding Arbitration* (1995). Moreover, the distinction between "faithful" execution of the law under Article II, and the "finely wrought" process for the creation of law under Article I §4, shows "a clear demarcation of the legitimate powers and responsibilities of both the president and congress." Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, U.S. Congressional Research Service (2014). Therefore, "congress may neither enforce the laws nor improperly intrude into the president's execution of the same, the president and his subordinates may not create law by unilaterally disregarding, amending, or repealing a validly enacted statute." *Id.* at 5.

As early as 1838, the Supreme Court recognized that "the power to legislate is a power possessed solely by congress, and to permit the president the freedom to suspend, amend, or

disregard laws of his choosing would be to "clothe" the executive branch with the power of lawmaking." *Kendall v. U.S. ex. rel. Stokes* 37 U.S. (12 Pet.) 524, 613 (1838). Since then, the Supreme Court has consistently recognized that "there is no provision in the constitution that authorizes the president to enact, to amend, or to repeal statutes." *Clinton v. City of N.Y.*, 524 U.S. 417, 488 (1998).

In *Train v. City of N.Y.*, 420 U.S. 35 (1975), the Supreme Court held that the President has neither the statutory nor inherent authority to refuse to spend money that Congress has allocated. The Court struck down President Nixon's attempt to impound funds, congress enacted a restrictive impoundment framework.

The Supreme Court has interpreted the Take Care Clause to ensure presidential control over those who execute and enforce the law. "It is to the president, and not to congress, that the constitution entrusts the responsibility to take care that the laws be faithfully executed." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976). In *Printz v. U.S*, 521 U.S. 898 (1997), the Supreme Court suggested that Congress could not vest state and local officers with the authority to enforce federal law, because doing so may intrude upon the President's duty to oversee those that execute the law. *Printz* suggested the act may impermissibly diminish presidential power, noting that the President "shall take care that the laws be faithfully executed," personally and through officers whom he appoints. The unity would be shattered, and the power of the President would be undermined, if Congress could act as effectively without the

President as with him, by simply requiring state officers to execute its laws. *Id.* at 922.

Article II, Section 3 of the Constitution clearly defines the President's duty to enforce all constitutionally valid acts of Congress, and requires the President to oversee the faithful execution of the laws, regardless of his own view. There is a clear separation of legitimate powers and responsibilities of both the President and Congress. The President cannot simply disregard or suspend laws enacted by Congress. Such action would go against the core foundation of the Constitution which limits presidential power. Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, U.S. Congressional Research Service (2014).

Underscoring the plain language of the Constitution itself, the Supreme Court has reiterated that the creation of the law belongs to the Congress while the execution of the law belongs to the President in *Youngstown Sheet & Tube Co. v. Sawyer*. Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, U.S. Congressional Research Service at 7 (2014).

The Supreme Court has acknowledged that the Congress's exclusive authority over naturalization, that Congress has plenary power over immigration, and recognized that it is in Congress's exclusive authority to dictate the policy pertaining to aliens' ability to enter and remain in the United States. *Kendall v. U.S. ex. rel. Stokes* 37 U.S. (12 Pet.) 524, 613 (1838). However, the President's 2014

immigration executive directive to Extend Deferred Action to Parents of Americans and Lawful Permanent Residents (DAPA) violates the Take Care Clause by exceeding the presidential power granted by the Constitution. The president should enforce the law and control over the law enforcement, rather than make or amend the law. *Buckley v. Valeo*, 424 U.S. 1 (1976). DAPA's grant of lawful presence and work permit eligibility are "measures incompatible with the expressed or implied will of congress," where the president's power is at its lowest ebb." *Texas v. United States*, 86 F. Supp. 3d 591, 637 (S.D. Tex. 2015). Since there is a substantive change to the immigration policy, the DAPA is, in effect, a new law despite the Administration official's claims that executive order is within the scope and impact of the President's authority. President should not interfere with Congress's authority to make laws.

The Administration has provided no adequate excuse or justification for its action. Rather, it has claimed a power to make significant policy on its own, even when that policy effectively amends the existing laws regarding the same matter which was enacted by Congress. In other words, The President claims a "dispensing" power to waive the law. This is not a proper exercise of prosecutorial discretion, and the Administration had engaged in a complete abdication of enforcement. The President cannot enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them. The President's action exceeds any authority conferred upon him either by the Constitution or by statute.

The President's 2014 DAPA directive was an overreach of his power and a violation of the

president's constitutional duty to "take care that the laws be faithfully executed."

III. BY ADOPTING THE SWEEPING NOVEMBER 2014 DAPA DIRECTIVE ORDER, THE ADMINISTRATION HAS UNCONSTITUTIONALLY USURPED THE FUNCTION OF THE LEGISLATIVE BRANCH OF GOVERNMENT UNDER ARTICLE I TO FORMULATE A NATIONAL POLICY CONCERNING IMMIGRATION.

Article I of the Constitution begins, "All legislative Powers herein granted shall be vested in a Congress... ." Note the all-encompassing language: Not "some legislative Powers" or "most legislative Powers or even "almost all legislative Powers," but "*all* legislative Powers." The clear converse of this statement is that *no* legislative powers vest in either the executive or the judicial branch of government. As Alexander Hamilton noted in *Federalist No. 78,* the Legislature exercises *will*, prescribing "the rules by which the duties and rights of every citizen are to be regulated;" the Executive exercises *force*, carrying out the will of the Legislature; while the Judiciary exercises *judgment.*

By enacting the November 2014 DAPA directive, the President has totally skewed his proper role in the constitutional separation of powers. Not only has he abdicated his executive duty to take care that the laws are faithfully executed; he has usurped the legislative policy-making role that the Constitution delegates to Congress.

Separation of Powers has been embedded in the United States Constitution since its beginning. In particular, the Framers of the Constitution designated the President as a passive agent of Congress because they were concerned about the unlimited expansion of President's powers over other branches. B. Dan Wood, *Congress and the Executive Branch: Delegation and Presidential Dominance*, The Oxford Handbook of the American Congress (2011). The United States Supreme Court has repeatedly emphasized that "the separation of powers can serve to safeguard individual liberty" and that it is the "duty of the judicial department" – in a separation-of-powers case as in any other – "to say what the law is," *N.L.R.B. v. Canning*, 573 U.S. ____, 134 S.Ct 2550, 2559-60, citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

Accordingly, Executive Orders are constitutionally valid only if they are based upon: (1) the Constitution; (2) statutes or treaties; or (3) the President's authority to ensure that the laws are "faithfully executed." These powers are narrowly construed "even during times of national crisis." Tribe, *American Constitutional Law* at 670-71 (1978). According to the House Government Operations Committee, "[e]xecutive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law . . . . In the narrower sense Executive [O]rders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly." U.S. Congressional Research Service,

Executive Orders: Issuance, Modification, and Revocation (RS20846; Apr. 16, 2014), by Vivian S. Chu and Todd Garvey, Text in Federation of American Scientist; Accessed: March 14, 2016, quoting Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study on the Use of Presidential Powers* (Comm. Print 1957).

"Federal Courts can review the constitutionality of Executive Orders" and "have found that specific Executive Orders were unconstitutional." *United States v. Elionardo Juarez-Escobar*, 25 F. Supp. 3d 774, 782 (W.D. Pa. 2014). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 588 (1952), the Supreme Court held that President Truman's Executive Order "directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills" was unconstitutional because President did not act within constitutional or congressional authority. Also in *Chamber of Commerce of U.S. v. Reich*, the Court of Appeals for the District of Columbia Circuit held that President Clinton's Executive Order "barring the federal government from contracting with employers who hire permanent replacements during a lawful strike" was unconstitutional because its impact was "quite far-reaching," so that the Order hindered employers' ability to choose their workers. 74 F. 3d 1322, 1324, 1338 (D.C. Cir. 1996).

Perhaps the strongest evidence that the President's executive memoranda violates the constitutional separation of powers, comes from the President himself. On March 28, 2011, the President

called upon Congress to pass legislation implementing the immigration policies he wanted, and he emphasized that he is restrained "from issuing an Executive Order on immigration because such action would exceed his executive powers" on several occasions before he "issued an executive order implementing a blanket amnesty program." *Juarez-Escobar*, 25 F. Supp. 3d at 14, quoting the Remarks by the President at Univision Town Hall:

"[W]e've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. . . . There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President."

(March 28, 2011), http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hal.

But Congress, the policy-making branch of the federal government, said "no" to the President; they refused to enact the changes he wanted. This was not simply legislative inaction; a majority of the elected legislators did not favor the changes the President demanded. Only then did the President issue the November 2014 executive memoranda, implementing by executive fiat the very changes he had previously said he did not have the authority to implement. The fact that he sought congressional legislation first, demonstrates that he himself

realized that this was properly a legislative rather than an executive matter.

The Administration has referred to these orders as "executive memoranda" rather than executive orders, although no clear difference between memoranda and orders has ever been articulated, except that executive orders are numbered and indexed while executive memoranda are not. In November 2014, White House Press Secretary Josh Earnest said the President would happily "tear up his own executive order" if Congress were to pass an immigration bill. He later backtracked, "I must have misspoke. I meant executive actions. So I apologize." *Obama Issues 'Executive Orders' by Another Name'*, Gregory Korte, *USA Today*, December 17, 2014. As the President acknowledged, the U.S. Constitution clearly has provided its structural safeguards to prevent any branch of government from usurping power and becoming tyrannical. Thus, the role of each branch "cannot be shared with other branches of government any more than the president can share his veto power or Congress can share its power to override vetoes." *Juarez-Escobar*, 25 F. Supp. 3d at 18, citing *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 241 (3d Cir. 2013). Particularly, Congress has exclusive power to create a uniform rule of naturalization under the Article I, Section 8 of the Constitution. Also, Congress's refusal to pass legislation to addressing immigration does not justify the President's unconstitutional executive order. *Id.* at 18. "Perceived or actual Congressional inaction does not endow legislative power with the Executive. This measurement – the amount/length of Congressional inaction that must

occur before the Executive can legislate – is *impossible to apply, arbitrary, and could further stymie the legislative process*." *Id.* (emphasis added). Moreover, "the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." *Id.* at 19, citing *N.L.R.B.*, 719 F.3d at 241. Therefore, even if the President believes that his executive memorandum is within the scope of his constitutional authority, such belief cannot constitutionalize an unconstitutional order.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), "Supreme Court reinforced the constitution's clear distinction between congress's role in the creation of the law and the president's role in the execution of the law, holding that the president may not take an action not authorized either by the constitution or by a lawful statute." Todd Garvey, at 7. In *Youngstown*, the challenge was about the executive order issued by President Harry Truman directing the Secretary of Commerce to seize various steel mills in an effort to avert the detrimental effect a potential worker's strike. *Id.* "The court invalidated the president's directive, holding that neither the constitution nor any statutory delegation from congress authorized such an order." *Youngstown*, 343 U.S. at 587-88. "The constitution limits the president's "functions in the lawmaking process" to recommending laws he supports, vetoing laws he opposes, and executing laws that have been enacted by congress." *Id.* Justice Black in his concurring opinion, stated "in the framework of our constitution, the President's power to see that the laws be

faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587. He concludes that "the executive, except for recommendation and veto, has no legislative power" and presidential action without congressional support "must be scrutinized with caution." *Id.* at 655, 638.

In a further effort to preserve the balancing and limiting effect of the separation of powers, the courts have held that the power of Congress to legislate cannot be delegated to another branch of government. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405 (1928), held that "The well-known maxim *'Delegata potestas non potest delegari'* applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law." The Court went on to say that Congress could delegate rule-making authority to another branch of government in order to interpret and apply the law passed by Congress, but only if Congress set reasonably clear guidelines or criteria for the exercise of that rule-making authority. *Id.* In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935), the Court invalidated Section 9(c) of the National Industrial Recovery Act because it "does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action." Although the nondelegation doctrine is not often used today,

this Court has never repudiated it, and in *Department of Transportation v. Association of American Railroads*, 575 U.S. ___ (2015), this Court unanimously remanded a case involving Amtrak regulations using language strongly suggesting that the nondelegation doctrine is very much alive. Professor Cass Sunstein suggests that the nondelegation doctrine takes its place as "one of the most prominent domains in which protection of individual rights, and of other important interests, occurs not through blanket prohibitions on governmental action, but through channeling decisions to particular governmental institutions, in this case Congress itself." Cass R. Sunstein, "Nondelegation Canons," *John M. Olin law & Economics Working Paper No. 82 (2nd Series)*, preliminary draft 31 August 1999, p. 28. Accordingly, the nondelegation doctrine should be applied more strictly in cases that involve constitutional rights, as does immigration.

In still another recognition of the constitutional limits of executive power, Congress has adopted the Administrative Procedure Act, which requires executive orders (with a few narrow exceptions) to be subject to notice and comment. 5 U.S.C. § 553. The Executive branch can be exempt from the notice-and-comment requirement only if the rule is an "interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). However, "if a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously. The APA's notice and comment exceptions must be narrowly

construed." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (footnote omitted) (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)). "When agencies attempt to enforce informal guidance, the courts routinely strike them down, sometimes harshly reminding the agencies that the only way to 'make law' for an agency is through the APA notice and comment rulemaking process." See, e.g., *NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (chastising EPA for issuing guidance that purported to bind regional offices, stating that "[such guidance cannot] be considered a mere statement of policy; it is a rule").

Here, despite the existence of the Immigration and Nationality Act (INA)'s "intricate regulatory scheme for changing immigration classifications and issuing employment authorization," DAPA "conferred [a lawful presence and employment authorization] on a group of undocumented immigrants who were parents to legal permanent residents or citizens of the United States." *Juarez-Escobar*, 25 F. Supp. 3d at 36. Thus, it is an affirmative agency action which "must go through [APA's] notice and comment [requirement].

When considering that "DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits," it is unlikely that Congress simply delegates "a policy decision of such economic and political magnitude to an administrative agency," especially without complying with the procedural requirements under the APA. In addition to the Constitutional concern, the court also must look at

the social impact of the DAPA on the States. "While the States are obviously concerned about national security, they are also concerned about their own resources being drained by the constant influx of illegal immigrants into their respective territories, and that this continual flow of illegal immigration has led and will lead to serious domestic security issues directly affecting their citizenry." *Texas v. United States*, 86 F. Supp. 3d 591, 605. (S.D. Tex. 2015).

By implementing policies that Congress refused to adopt, and by doing so in a manner that avoided the legal requirement of public comment that undoubtedly would have been strongly opposed to these policies, and by refusing to execute laws that he is constitutionally obligated to execute, the President has both usurped the policy-making responsibility that the Framers wisely delegated to Congress and abdicated his constitutional duty to "Take Care that the laws be faithfully executed." and. In so doing, he has made a shambles of the constitutional structure adopted by the Framers in 1787 and ratified by the states by 1789.

IV. THIS NATION'S JUDEO-CHRISTIAN TRADITION IS CONSISTENT WITH ENFORCING IMMIGRATION LAWS FAIRLY AND CONSISTENTLY IN ACCORDANCE WITH THE "TAKE CARE" CLAUSE OF ARTICLE II OF THE CONSTITUTION.

Every President in American history has quoted from the Bible as a source of support for his

policies, and lawmakers have often done likewise. Lexis searches conducted in 2002 revealed that federal courts and state supreme courts have cited the Ten Commandments (excluding other parts of the Bible) in at least 1,106 cases.[2]

The Bible and the Judeo-Christian tradition have historically played, and continue to play, a major role in shaping the moral values of our nation,[3] and those moral values play a major role in shaping the nation's laws and policies, including the nation's laws and policies concerning immigration. The Bible has so often been quoted and sometimes (in *Amicus's* opinion) misquoted in the immigration debate, and the nation's Judeo-Christian tradition has often been invoked and sometimes (in *Amicus's* opinion) misstated in the immigration debate. Because *Amicus* Foundation for Moral Law is a Christian organization that seeks to bring a Biblical perspective to constitutional issues, *Amicus* respectfully sets forth this perspective on the issue of immigration.

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[2] Lexis searches conducted by John Eidsmoe in March 2002 and October 2002; cited and fully described in John Eidsmoe, *Historical and Theological Foundations of Law* (American Vision / Tolle Lege 2012) I:431-68.

[3] On October 4, 1982, the United States Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening clause of the bill states,

Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States; ...

1. The Bible commands obedience to lawful authority.

The Bible enjoins fairness for all, including the stranger within the gates; see Leviticus 19:33-34, 24:22; Deuteronomy 24:14, 19-22; Exodus 12:49; Matthew 8:10; Luke 10:25-27. However, it is a stretch of logic and principle to say this injunction requires a nation to admit or decline to deport those who have entered the nation illegally. If the sojourner wanted to become a Jew, the Jewish Law specified the means by which he or she might do so; see Exodus 12:48 and Isaiah 56:6-7. Policies by which those who have entered the country illegally and are given a path to citizenship or lawful presence ahead of those who have meticulously followed legal paths to citizenship or lawful residents, are inherently unfair. Even elementary school children know it is wrong to "crowd" in line.

In Romans 13:1-7, Paul (a Jewish lawyer converted to Christianity) commands obedience to civil authority:

Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.
2 Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.
3 For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same:

4 For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.
5 Wherefore ye must needs be subject, not only for wrath, but also for conscience sake.
6 For this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing.
7 Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.

I Peter 3:13-17 likewise commands obedience to civil authority:

13 Submit yourselves to every ordinance of man for the Lord's sake: whether it be to the king, as supreme;
14 Or unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well.
15 For so is the will of God, that with well doing ye may put to silence the ignorance of foolish men:
16 As free, and not using your liberty for a cloke of maliciousness, but as the servants of God.
17 Honour all men. Love the brotherhood. Fear God. Honour the king.

And the sojourner was subject to the same law as the citizen:
One law shall be to him that is home-born and unto the stranger that sojourneth among you. Exodus 12:49

Ye shall have one manner of law, as well for the sojourner as for one of your own country; for I am the Lord your God. Leviticus 24:22
Ye shall have one law for him who sinneth through ignorance, both for him who is born among the children of Israel, and for the stranger who sojourneth among them. Numbers 15:29

The President's DAPA directive that gives preferential treatment to those who have entered or remained in the country illegally, is manifestly inconsistent with the Biblical and Judeo-Christian tradition of obedience to law and equal and impartial justice for all.

2. The main purpose of civil government is to protect the safety and well-being of its citizens.

As we have seen, Romans 13 declares that the duty of the civil ruler is to punish those who do evil and reward those who do good. Writing to Timothy, Paul exhorts prayer for all, especially "For kings, and for all that are in authority, that we may lead a quiet and peaceable life in all godliness and honesty." (I Timothy 2:2)

In the Biblical view and the Judeo-Christian perspective, God has established nations, and He has established governments over each of these nations (Daniel 2:21: "He removeth kings, and setteth up kings."). The primary duty of each nation's civil government is to protect and promote the safety and well-being of the people of that nation. Any governmental responsibility toward the people of

other nations is, at most, secondary As Paul says to Timothy, "But if any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5:8). That which Paul presents as a family principle is, on a larger scale, applicable to a nation. A policy allowing some kinds of immigration can enrich a nation with new blood and new talent. But if government allows immigration to take place in ways that jeopardize the health, safety, and economic well-being of its own people, that government has violated its first duty.

Amicus respectfully presents this Biblical analysis, not to impose its views on the Justices, but rather to demonstrate that a Biblical perspective and a Judeo-Christian conscience do not require blind acceptance of policies that would admit or retain millions of immigrants who have not complied with the law..

CONCLUSION

The Framers of our Constitution wisely separated the powers of government into three distinct branches, so that no one branch could usurp power and become tyrannical and oppressive. Before a statute goes into effect, it is passed by both Houses of Congress and signed by the President, except in unusual cases in which Congress has overridden a presidential veto. Laws therefore reflect careful deliberation, the concurrence of both Houses of Congress and usually the approval of the President.

It is wise and prudent that national laws and policies should be adopted only with such deliberation.

One way the President can usurp legislative power is to, under guise of executive directives, adopt laws and policies that Congress has refused to pass. An equally effective way the President can usurp legislative power is to refuse to enforce laws that Congress has passed. The Framers intended to prohibit both, and the Constitution they adopted prohibits both.

By enacting the November 2004 DAPA directive, the President has both usurped Congress's authority to pass laws and abdicated the Executive's duty to "take Care that the Laws be faithfully executed."

To preserve the separation of powers set forth in the Constitution, this Court should affirm the decision of the Fifth Circuit.

Respectfully submitted, this the 4th day of April, 2015.

/s John A. Eidsmoe
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